

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DWIGHT REUST)	
Claimant)	
)	
VS.)	
)	
U.S.D. 417)	
Respondent)	Docket No. 1,055,405
)	
AND)	
)	
UNION INS. CO. OF PROVIDENCE)	
Insurance Carrier)	

ORDER

Respondent requests review of the May 12, 2011¹ preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders.

ISSUES

The claimant injured his shoulder when he fell as he stood up from the chair he was sitting in while on a break from his work. Claimant argued that the cause of the fall was an unexplained neutral risk and compensable. Respondent argued that the fall was caused by a personal risk due to claimant's medical condition and not compensable.

The Administrative Law Judge (ALJ) found claimant's fall at work was caused by a neutral risk and authorized medical treatment with Dr. Daniel T. Hinkin remaining as the authorized treating physician, along with temporary total disability beginning April 27, 2011 until claimant is released to return to work with restrictions or reaches maximum medical improvement.

¹ An Order Nunc Pro Tunc was issued on May 16, 2011, to correctly identify Dr. Daniel T. Hinkin as the authorized treating physician.

The respondent requests review of whether the claimant suffered personal injury by accident arising out of and in the course of his employment. Respondent contends that claimant's fall was due to a personal risk and for that reason the Board should reverse the ALJ.

Claimant argues that the ALJ Orders should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant was employed as a night janitor for the elementary school in Council Grove. His shift was 1 p.m. to 9:30 p.m. with two breaks. A typical work day for the claimant was arriving and completing a sweep of the bathrooms, collecting trash and checking for spills and anything that might need attention. Claimant testified that his work requires him to bend a lot. He normally doesn't squat because he has a hard time getting back up. Claimant has a cart that he pushes with all of his supplies on it. At 3 p.m. he would go outside and act as the crossing guard until 3:25 p.m. and then he went back inside, would take a break and then resume his duties by emptying trash cans in the classrooms. He testified that he tried not to get into the classrooms until 4 p.m. in order to allow the teachers to finish with their work. Claimant took his dinner break from 5-5:30 p.m. Claimant testified that there are 3 tables in the break room with 4 chairs on each side and 1 on each end and 2 extra chairs against the wall. The room also has a pop machine, refrigerator, two microwaves, a snack machine, a counter and sink as well as mailboxes for the teachers. Claimant is also responsible for cleaning the break room.

In January 2011, claimant was hospitalized with double pneumonia. He was treated and released on January 19, 2011. Claimant testified that he informed respondent of his illness. Claimant returned to work on January 21, 2011, with no restrictions. Claimant was off for the weekend and then returned to work on January 24, 2011.

On January 25, 2011, claimant was on his second break somewhere between 7 and 7:30 p.m. He took the break because he was not feeling up to par and decided to take a 5-10 minute break. Claimant admitted that he had suffered from pneumonia several days before, but claims he hadn't had any problem or symptoms on this date. He testified that when he stood up after his break his legs started to spasm, cramp up, shake and he thought he should sit back down, but he had already moved away from his chair. As he started to fall he tried to catch himself but was unable to and his head and shoulder hit the table as he fell to the floor. The accident left him with the top of his head and forehead skinned and a lump above his right eye. Claimant denies being dizzy when he stood up to go back to work after his break on this day.

After the accident, claimant tried to call Mrs. Parks, the principal, but did not get an answer so he wrote out a statement and left it on her desk at the end of his work day, which was at 9:30 p.m. The note stated:

On Jan 25, 2011 at around 7:30 pm I wasn't feeling very good and went to take a break (Having gotten out of the hospital with pnemonia [sic] on the 1-19-2011). When I went to stand up I started having leg cramps and before I could set [sic] back down I lost my balance and fell hitting the edge of the table with the right side of my forehead [sic] and scalp, causing a lump above right eye. I also jamed [sic] both arms and sholder [sic] trying to break the fall. Left note on Mrs Parks desk.²

After his statement was received, claimant was told that he needed to go to the District Office to fill out an injured employee report. He filled out the report but he was not asked if he needed medical attention and none was offered.

Claimant decided to seek medical attention on his own and called the insurance carrier and spoke with Kathryn Cox. He told her about the accident and how he was still having pain and needed to see a doctor. Claimant noted that respondent has a policy that if you are hurt and need medical attention you can go to any doctor that you want to receive medical treatment. Claimant also continued to work after the accident with no accommodations.

Ms. Cox made arrangements for the claimant to see Dr. Hinkin, an orthopedic specialist in Manhattan. Dr. Hinkin opined that the claimant needed surgery on his shoulder. Claimant reported this to Kathryn Cox, who told claimant that the surgery would not be covered under workers compensation as the claim was not compensable. Claimant went ahead and had surgery anyway on April 27, 2011, through his health insurance.

Claimant met with Dr. Hinkin on March 31, 2011, with the chief complaint of left shoulder pain. The doctor's medical record indicates that claimant got up too fast and fell. Dr. Hinkin examined the claimant, reviewed his x-rays of the left shoulder and opined that he had a left subacromial impingement, possible rotator cuff tear, left acromioclavicular arthrosis and mild left glenohumeral degenerative joint disease. Claimant's treatment options were discussed and he requested an MRI. Dr. Hinkin complied with the request and allowed claimant to pursue activity as his pain allows. But claimant was to minimize lifting with the left arm away from his side or using the left arm overhead until such time that the MRI results come in and further recommendations can be made.

Dr. Hinkin met with the claimant again on April 22, 2011. He reported that the MRI of the left shoulder revealed a tear of the supraspinatus and claimant elected to have

² P.H. Trans., Cl. Ex. 1.

surgery to repair it. Dr. Hinkin also added to his diagnosis of the claimant asthma, hypertension, elevated cholesterol and sleep apnea. Claimant had surgery on April 27, 2011. Claimant had a good result from surgery and completed physical therapy.

Kathryn Cox, a claims adjuster for Employers Mutual Casualty Company, testified that she handled workers compensation claims for the company. Ms. Cox's job is to determine the compensability of claims and on compensable claims she administers and manages the medical, temporary total disability benefit and the finalization of the claims.³

Ms. Cox testified that she received a claim for a work accident on January 25, 2011, for the claimant and the first thing she did was call the respondent to get the details. She was told that it would be a report only claim because the claimant had not sought medical. Ms. Cox testified that with report only claims the procedure is to leave it open for 60-90 days in case something comes up. If so, it can be taken care of. She instructed claimant to call her if he decided he needed medical attention. She testified that it was March 4, 2011, before she heard from the claimant through his wife about his shoulder problems and request to seek medical attention. This prompted her to further investigate the claim and set up an appointment with Dr. Hinkin an orthopedic doctor in Manhattan.

The first time that Ms. Cox spoke with the claimant was on March 8, 2011, when claimant told her that he suffered injury to his head and both shoulders on January 25, 2011, after becoming lightheaded and hitting his head and shoulder on a table and falling. Ms. Cox testified that claimant told her he thought the lightheadedness was due to the pneumonia he had a few weeks prior and he wasn't totally over it yet or maybe due to high blood sugar. Ms. Cox testified that there was no doubt in her mind that claimant stated that he had felt lightheaded the day he fell.

After gathering all of the information about what happened and after consulting with her supervisor, Ms. Cox determined that claimant did not have a workers compensation claim. It was determined that the incident was a personal risk rather than employment related. Ms. Cox informed claimant by telephone and letter dated March 8, 2011, that he did not have a workers compensation claim because it was determined that the incident did not arise out of and in the scope of his job duties. Ms. Cox testified that her decision to deny the claim had nothing to do with the fact that claimant had been on a break. It was based upon the cause of claimant's lightheadedness.

Ms. Cox, in the course of her investigation, did not inquire as to whether breaks were part of the normal business day for employees and she did not inquire as to whether employees were getting paid while they were on breaks. She also never inquired as to whether the break room was on school property, but assumed it was. She was only aware that claimant was on a break at the time of the accident and that claimant had pneumonia

³ Cox Depo. at 4.

a few weeks before. The paperwork that Ms. Cox received from respondent simply stated that the claimant was moving from a sitting position to a standing position. She was not aware that the claimant had leg cramps at the time of the accident and that is why he lost his balance and fell. She doesn't know why the claimant didn't mention the leg cramps to her.

She took no further action after that other than to call Dr. Hinkin's office to advise that claimant did not have a workers compensation claim and his appointment costs would need to be charged to claimant's personal health carrier.

Claimant also told Judy Parks, the principal of the Council Grove Elementary School, that he was not feeling well and had gone to the break room to sit down. And that is when he started to stand up, felt dizzy and fell. Claimant told Ms. Parks that he thought the dizziness was due to a change in his diabetic medication.

Claimant admits that if he gets up too fast his legs will cramp up, but he denies ever getting lightheaded from getting up too fast and denies telling Dr. Hinkin that dizziness played a part in his accident.⁴ But claimant admitted to a history of leg cramps and to reporting this to Drs. Hornung and Hawkins. For treatment of these leg cramps, claimant had been prescribed 2,000 units of calcium a day. Claimant also takes diabetes medication and several other medications for other conditions.

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.⁵ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.⁶

⁴ P.H. Trans. at 43-44.

⁵ K.S.A. 2009 Supp. 44-501(a).

⁶ *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

The dispositive issue in this case is whether claimant's accidental injury arose "out of" his employment with respondent. In *Hensley*,⁷ the Kansas Supreme Court categorized risks associated with work injuries into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks which have no particular employment or personal character. "Only those risks falling in the first category are universally compensable; personal risks do not arise out of the employment and are not compensable."⁸ In Kansas, unexplained falls are compensable as a neutral risk.⁹

The respondent's insurance carrier relied upon the testimony from Kathryn Cox, a claims adjuster for Employers Mutual Casualty Company, who testified that claimant told her he became lightheaded as he was getting up from the chair. Claimant thought the lightheadedness was due to pneumonia he had a few weeks prior and he wasn't totally over it yet or maybe due to high blood sugar. Claimant also told Judy Parks, the principal of the Council Grove Elementary School, that he was not feeling well and had gone to the break room to sit down. And that when he started to stand up he felt dizzy and fell. Claimant told Ms. Parks that he thought the dizziness was due to a change in his diabetic medication. Consequently, respondent's insurance carrier denied the claim because it felt the accident was caused by claimant's personal condition.

But claimant denied that he told Ms. Parks, Ms. Cox or Dr. Hinkin that he was dizzy before the fall. Claimant prepared a handwritten explanation of his accident dated January 26, 2011. Claimant agreed that he wasn't feeling well and took a break noting that he had gotten out of the hospital on January 19, 2011, for treatment of pneumonia. Claimant noted that when he started to stand up he began having leg cramps, lost his balance and fell. Claimant testified:

Q. Well, let me ask it this way. I think you've said already it's your position you didn't think you were dizzy, right?

A. No.

Q. You didn't think you were lightheaded, right?

A. No.

Q. And I think you said that you had cramps in your legs and you started shaking and you fell, right?

⁷ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d. 5, 61 P.3d 81 (2002).

⁸ *Martin v. U.S.D.* 233, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

⁹ *McCready v. Payless Shoesource*, 41 Kan. App.2d 79, 200 P.3d 479 (2009).

A. Right.

Q. Is there something else you're attributing your fall to other than your leg cramps?

A. My questioning on the answer is that I'm not a medical doctor. So for me to say that this is what caused it, I'm not a qualified person to say that.

Q. I'm not asking you for a medical opinion, sir. I'm just asking you for your own - -

JUDGE SANDERS: Mr. Reust, I think the question is aimed at kind of what happened and what happened at that point immediately before you fell, what did you feel like? That's what we're asking.

A. I went to stand up. I was having cramps in the legs. The legs started to shake and they would not hold me up.

Q. (By Mr. Laskowski) Did you feel any other symptoms?

A. Not that I'm [a]ware of.¹⁰

Claimant testified that he has a history of leg cramps when he gets up too fast.¹¹ And claimant agreed he suffers leg cramps away from work as well as at work. Claimant further testified that he had reported this problem to his doctor and had been prescribed 2,000 units of calcium a day before the accident. Moreover, when claimant initially sought treatment from Dr. Hinkin for the injuries suffered in the fall, the doctor's note indicates that claimant got up too fast and fell.

As previously noted, personal risks are not compensable. This Board Member disagrees with the ALJ's conclusion that the reason for the fall was not explained. The reason for the fall was adequately explained by the claimant. Claimant testified that as he stood his legs cramped causing the fall. And claimant further agreed that he had a history of leg cramps occasioned by getting up too fast. Finally, claimant told Dr. Hinkin that he stood up fast and then fell. Moreover, claimant had been provided medication for his leg cramps before the fall at work. Simply stated, claimant had a previous history of leg cramps, which was a risk personal to claimant, and the facts establish that leg cramps caused the claimant's fall. Such personal risks are not compensable. Accordingly, this Board Member finds claimant did not suffer personal injury by accident arising out of his employment with respondent. The injury suffered by claimant in this case is attributable to a personal condition of the claimant and compensation is denied.

¹⁰ P.H. Trans. at 55-57.

¹¹ *Id.* at 43.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.¹² Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated May 12, 2011, is reversed and the claim for compensation is denied.

IT IS SO ORDERED.

Dated this _____ day of August 2011.

DAVID A. SHUFELT
BOARD MEMBER

c: Michael C. Helbert, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Rebecca Sanders, Administrative Law Judge

¹² K.S.A. 44-534a.